United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 75-6108

B

United States Court of Appeals

For the Second Circuit.

P/S

EDWARD KAVAZANJIAN, FRANK BENEMIO, EDWARD BERTELE, FRANK COSTAS, JOSEPH D'AMICO, JOSEPH FARRELL, ALEX FLASTERSTEIN, MARTIN GREENFIELD, JOHN MARTIN, ARTHUR OPPOLION, PETE SCALCIONE, AND, AS A CLASS, ALL INVESTIGATORS OF THE U.S. IMMIGRATION AND NATURALIZATION SERVICE, IMMIGRATION AND NATURALIZATION SERVICE LOCAL NO. 1917 (American Federation of Government Employees AFL-CIO), AND NATIONAL COUNCIL OF IMMIGRATION AND NATURALIZATION LOCALS,

Plaintiffs-Appellants,

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE, THE U.S. CIVIL SERVICE COMMISSION, and THE UNITED STATES OF AMERICA, ROBERT E. HAMPTON, JAMES E. JOHNSON, AND L.J. ANDOLSEK, MEMBERS OF THE U.S. CIVIL SERVICE COMMISSION,

Defendants-Appellees.

Appellants' Brief

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Defendants-Appellees.

PRELIMINARY STATEMENT

This is an appeal from the opinion and order of the Hon. Milton Pollack, United States District Judge, Southern District of New York, entered on August 18, 1975 granting judgment to the defendants following trial, and dismissing the complaint herein.

STATEMENT OF THE CASE

This suit is a class action[1] commenced on July 15, 1969 by 11 named Investigators employed by the Immigration and Naturalization Service, and their collective bargaining representatives, seeking declaratory and injunctive relief, and back pay as a result of conduct which appellants contend denied

1. A class action order was entered on consent of the parties on Aug. 18, 1971.

them proper grade level classification and compensation under the Civil Service Act. The defendants to this action are the U.S. Civil Service Commission (CSC), the U.S. Immigration and Naturalization Service (INS), the United States, and the individual members of the Civil Service Commission. In particular, the Investigators assert that they were improperly denied classification at the Federal Civil Service grade of GS-12, as provided in a Position Classification Standard promulgated by the Civil Service Commission in 1959.

The parties filed cross-motions for summary judgment which were rendered moot by the trial which was held between June 18, and June 30, 1975, and which included the testimony of 16 witnesses and the receipt in evidence of approximately 800 pages of documents. Following the trial, the District Court rendered judgment for the defendants and dismissed the complaint.

STATEMENT OF ISSUES PRESENTED

1. Whether the trial court erred in not holding that the Immigration & Naturalization Service wrongfully declined to implement the applicable Position Classification Standard prior to the filing of employee classification appeals with the Civil Service Commission.

2. Whether the trial court erred in not holding that the evaluations made by the Civil Service Commission in 1966 and 1968 were arbitrary, capricious, not based on substantial evidence, and otherwise unlawful.

3. Whether the Immigration & Naturalization Service and Civil Service Commission unlawfully applied a double standard in classifying investigator positions throughout the United States, and thereby violated the statutory mandate of equal pay for substantially equal work. [5 U.S.C. 5101a].

4. Whether the appellant Investigators are entitled to retroactive promotions and back pay as a result of the appellees' unlawful conduct.

STATEMENT OF FACTS

In 1959, a Standard was published by the U.S. Civil Service Commission, which, by statute, governs the classification and grades of non-supervisory General Investigators employed by the Immigration and Naturalization Service. Such Standard (A.458-472)* provides for grade levels of GS-9, GS-11, and GS-12 for INS General Investigators. The parties have stipulated that during all relevant periods, this standard constituted the basis under which the Immigration Service was required to classify the named plaintiffs, and other General Investigators. (A.36-37)

As of 1963, there were no non-supervisory general investigators employed by the Immigration and Naturalization Service in the New York region at the GS-12 grade level. (A.37) Beginning in 1963, Investigator Kavazanjian, and other members of the plaintiff class, as well as the American Federation of Government Employees, protested the failure of the INS to implement the Standard and create GS-12 positions. (A.37, 572-583) In this regard, extensive written submissions and oral presentations were made by plaintiff Kavazanjian to key Immigration & Naturalization Service management personnel which outlined in detail the duties which were regularly performed by GS-11 investigators which they in good faith believed to be at the GS-12 level. (A.572-583).

As will be outlined more thoroughly in Argument I, *infra*, the response of the Immigration & Naturalization Service was both vague and dilatory. The prime justification advanced by the Immigration & Naturalization Service for its refusal to promote GS-11 investigators to GS-12 under the Standard was that all GS-12 assignments were being performed by supervisory investigators already at the GS-12 level. (A.37, 227). Contrary to that assertion, however, the uniform testimony of numerous witnesses at trial establishes that Immigration & Naturalization Service supervisory investigators virtually never performed investigations themselves, and virtually never even went out into the field, assigning *all* investigations to their lower graded

*References followed by the letter "A" refer to pages in the Joint Appendix.

subordinates. (A.567-570, 637, 672, 695, 698-9, 719, 789-90, 799, 812, 949-951).

Between December of 1963, and approximately June, 1966, Mr. Kavazanjian and other investigators attempted to persuade the Immigration & Naturalization Service that they were, in fact, performing work at the title and grade of General Investigator GS-12. Such efforts were of no avail, however, and in June, 1966, 52 investigators including named plaintiffs Kavazanjian, Bertele, Flasterstein, D'Amico, Benemio and Farrell, filed formal classification appeals with the Civil Service Commission requesting that their positions be upgraded from GS-11 to GS-12. Mr. Samuel Friedman, the retired Civil Service Commission official who appeared at trial testified that this was the largest mass classification appeal which he had ever seen. (A.39, 821).

In consideration of the classification appeals, Mr. Friedman, then an official of the New York regional office of the Commission, conducted an evaluation of the work and responsibilities of the appealing investigators. (A.39, 584-602, 638-643, 673, 690, 698-700, 720-722, 753-757, 772-775, 812-816, 794-795, 801-804, 819-870). As will be discussed more fully in Argument II, *infra*, the record demonstrates that the evaluations done by the CSC classification specialists were incomplete, non-objective, inaccurate, and slipshod; and that appropriate notes and records were either never made, or never properly associated with the Commission's files.

On February 1, 1967, the New York regional office of the Civil Service Commission ruled on the appeals which had been filed by the investigators. Eleven investigators were upgraded to GS-12; one investigator was downgraded to GS-9; the appeals of 36 investigators were denied. (i.e. they were found properly graded at GS-11). The six named plaintiffs set forth above were among those whose appeals were denied (A.39-40). Those plaintiffs whose appeals were denied received only form letters which contained no meaningful explanation as to how the adverse decision in their cases had been reached and which contained no individual case analysis or percentage breakdown of the kinds of cases assigned to them. (A.107-110, 143-146, 147-150, 151-154, 210-213). The above cited decisions were purportedly based on

an application of the Commission's "majority time rule." The majority time rule is, in effect, a rule that an employee may be reclassified to a higher grade if a majority of his or her time is spent on work of that level (A.40, 833).

In March, 1967, 25 investigators appealed the denial of their classification appeals to the Commission's Bureau of Inspections in Washington, D.C. The 6 named plaintiffs included their cases in this appeal. (A.40). In June, 1967, the Bureau of Inspections granted the appeals of 12 of the appealing inspectors, including that of Mr. Kavazanjian. The remaining 13 appeals were denied, including those of the other appeallants named above. (A.41). Prior to the issuance of the decision of the Bureau of Inspections, which was acting as an appellate body within the Commission, Mr. Van Tassell, the official in the Bureau primarily responsible for rendering a decision in the matter, conferred in considerable detail with Mr. Samuel Friedman, the official in the New York regional office responsible for the initial decisions, concerning the adjudication being made. (A.876-881).

Appellant Kavazanjian, and the other investigators whose appeals were granted by the Bureau of Inspections in June 1967 were promoted from GS-11 to GS-12, however, they never have received any back pay or other compensation for the years spent classified at grade GS-11 while performing work at grade level GS-12. (A.41).

In 1967, following the decision of the Civil Service Commission on the Investigator classification appeals, and upon the urging of the Civil Service Commission, the Immigration and Naturalization Service initiated a nation-wide survey of its offices to determine whether other investigators should be reclassified to GS-12. Additionally, many investigators in the New York district whose appeal had been denied by the Commission requested that Mr. Esperdy, the New York District Director, intervene in their behalf in order to assist them in securing promotions to grade GS-12. (A.952, 955-956, 957-958, 967-976). As a result of the 1967 nation-wide review by the Immigration & Naturalization Service, 45 additional investigators were promoted to GS-12 (A.968). In the New York district, on the basis of Mr. Esperdy's evaluations, six additional investigators were reclassified from

GS-11 to GS-12 (A.953). Many of the investigators promoted to GS-12 as a result of the Immigration & Naturalization Service nationwide survey were *not* performing GS-12 level work for a majority of their time prior to promotion. (A.970-971, 170, 474-478, 479-481, 482-486).

In June, 1968, 16 new classification appeals were filed, seeking promotion of investigators from GS-11 to GS-12. Five of the named appellants, Costas, Flasterstein, Greenfield, Martin and Oppolion were included in the group. On November 8, 1968, the appeals of 14 of the investigators (2 had withdrawn) were denied by the Regional Office of the Civil Service Commission. These denials included the appeals of the above named appellants (A.42). The administrative record filed by the Government gives no indication of the auditing of the 1968 appellants by any representative of the U.S. Civil Service Commission. For the reasons explained in detail in Argument II *infra*, the record clearly establishes that the Civil Service Commission conducted no position audits at all in connection with the above-mentioned appeals, and that the Commission relied entirely on a survey done by the Immigration & Naturalization Service (A.302, 303, 523, 678, 732). The testimony of record also demonstrates that the appellants, who were expecting to be audited by the Civil Service Commission, and not by the Immigration & Naturalization Service from whose decision they were appealing, declined to speak with the Immigration & Naturalization Service classifiers. (A.733, 735, 881, 897).

Investigator Scalcione filed a separate classification appeal on February 27, 1968. This appeal was denied by the regional office of the Civil Service Commission on May 31, 1968. The decision of the regional office was affirmed by the Civil Service Commission. (A.44). As discussed more fully in Argument II, *infra*, the Civil Service Commission wrongfully failed to consider and evaluate all of the higher grade level work which Mr. Scalcione had been working on between November, 1966 and February, 1968. The Commission's evaluation of said appellant's work was arbitrary and non-objective.

In May, 1968, plaintiff D'Amico filed a second classification

appeal. This appeal was denied by the regional office of the Commission which declined to give consideration to an important higher level case on which Mr. D'Amico had been working for a large portion of his time at the time of his appeal. The investigation in question had been assigned on October 4, 1967 and was removed from him on May 10, 1968 which was one month subsequent to the filing of Mr. D'Amico's classification appeal (A.366-367, 378-9, 380, 389). In this regard, there was testimony to the effect that the *only* time cases were taken away from an investigator was when he had appealed his grade classification. (A.633-634).

At all times relevant to this action the Civil Service Commission has applied the *majority time rule* in adjudicating classification appeals of investigators employed by Immigration & Naturalization Service in the New York region. This rule requires that an incumbent be performing work at a higher grade level for at least 51% of his time in order to be reclassified at the higher grade level. In other cases and in other regions of the Immigration Service, the Civil Service Commission has approved the application of *substantial time rule* in adjudicating appeals and making promotions. The substantial time rule requires only that the employee be performing *approximately* 25% of his time at the higher grade level in order to be reclassified upward. (A.89-91, 131, 132, 162-163, 454-457). The result of using the substantial time rule in some areas of the country and the majority time rule in other areas of the country is that employees occupying the same position and doing virtually the same work receive different grades. (A.844-845).

In 1968, the U.S. Civil Service Commission published a report entitled "Evaluation of Personnel Management," relating to the Immigration & Naturalization Service. In a letter transmitting the report to the Attorney General of the United States, John W. Macy, Jr., Chairman of the Civil Service Commission, noted that the Commission had recently completed a nation-wide inspection of personnel management activities of the Immigration & Naturalization Service. The letter proceeded to note that one of the principal conclusions of the report was:

> "The position classification program has been used to *keep grades down* for employees without regard to the

actual level of work being performed. The agency's failure to operate an adequate and effective classification program has resulted in hundreds of employees filing classification appeals with the Civil Service Commission." (A.92-93). [Emphasis added]

The report itself contains the following statement (A.96):

> "*The Immigration & Naturalization Service was not meeting its responsibility under the classification act of 1949* (now Title 5, Chapter 51 U.S. Code) by carrying on a program that would assure the Commissioner, the Attorney General, and the Civil Service Commission that its obligation to classify jobs accurately under Civil Service Commission standards would be met. Employees tended to rely on appeals to force management to take classification action that should have been taken on management's own initiative . . . Individual and group classification appeals had been filed by employees in most of the major occupations. Well over 300 appeals had been filed since April 1966 by employees from all sections of the country. [Emphasis added]

SUMMARY OF ARGUMENT

Appellants submit that all of the issues which are raised on appeal are either pure questions of law, or mixed questions of law and fact, both of which are fully reviewable by the Appellate Court. As to those questions which are arguably questions of fact, we contend that the record establishes that the Trial Court's findings are clearly erroneous within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure, and the cases decided thereunder.

1. The record clearly establishes that between 1959 and at least 1967 the Immigration & Naturalization Service was not meeting its statutory responsibility under 5 U.S.C. Section 5107 to "place each position under its jurisdiction in its appropriate class and grade in conformity with standards published by the Civil Service Commission". The record indicates that the Service engaged in dilatory tactics, and the repeated publication of flagrantly inaccurate representations. The legal conclusion that the Immigration & Naturalization Service was not complying

with the requirements of the statute throughout this period of time, is not only established by the testimony of the Investigators and documentary exhibits, but is also confirmed by the results of the 1966-1967 C.S.C. and I.N.S. surveys, and by the express and unqualified language of the 1968 Civil Service Commission report to the Attorney General (A.92-98).

II. Appellants further assert that the record establishes that the Commission did not properly carry out its responsibility under 5 U.S.C. Section 5112, to act upon employee classification appeals, and correct inadequate Civil Service grade classification. In connection with the 1966 appeals, the Commission acted in a manner which can only be described as arbitrary, capricious, and result-oriented. The improper nature of the Commission's conduct is reflected both in the well-documented failure of that agency to make its files available to the involved appellants at the time of appeal, and also in the sloppy, haphazard, and incomplete "administrative record" which was furnished to appellants and filed with the court in connection with this litigation. Furthermore, the testimony of numerous appellants regarding the manner in which they were audited by Commission representatives; the inconsistent and ambiguous testimony of the C.S.C. official primarily responsible for the appeals; and the vague generalized language of the decision letters themselves, compells the conclusion that the Commission did not in fact make an objective proper determination under the statute, and that its final evaluations were not based upon substantial evidence.

III. With regard to the 1968 group classification appeal, the record establishes beyond dispute that the Commission totally and unjustifiably abdicated its statutory authority, and permitted the employing agency—INS—to supply the audits and evaluations which formed the basis for the Commission's adverse determination. With regard to the separate classification appeals filed in 1968 by appellants Scalcione and D'Amico the Commission manifested a flagrant and illegal disregard of the duties and responsibilities actually being performed by these appellants. The Commission's disregard for statutory mandate during this period was most poignantly demonstrated in the case

of the appellant D'Amico who had a major higher level investigation which occupied a majority of his time removed from his control, *subsequent* to his appeal but *prior* to the Commission's adverse decision thereon. The record establishes beyond doubt that investigator D'Amico was given no credit at all for this assignment, and that the direct result of its removal by the employing agency was the denial of the appeal by the Civil Service Commission.

IV. The record also establishes that the INS and the CSC deliberately applied a double standard for classifying investigator positions throughout the United States in direct contravention of the statutory mandate in 5 U.S.C. Section 5101 of providing "equal pay for substantially equal work." In particular, the CSC authorized and directed the utilization of the *majority* time rule in New York (requiring an investigator to spend 51% of his time on higher level work for upgrading) and the *substantial* time rule (approximately 20% of higher level work necessary for upgrading), in other areas of the United States. The inequity of the situation became even more apparent in 1967 when INS made investigator promotions based on application of the *substantial* time rule, while many of those whose classification appeals had just been denied by the CSC based on the majority time rule remained in their lower graded positions.

V. Plaintiffs submit that as a result of the undeniable violation of statutory mandate by the CSC and INS the appellants and the class which they represent are entitled to back pay and other retroactive benefits. Although, in the past the courts have been reluctant to award back pay in classification matters under the doctrine of sovereign immunity, recent decisions by the federal courts, the Comptroller General, the Federal Labor Relations Council, and arbitrators interpreting collective bargaining agreements, have made back pay a meaningful and commonplace remedy for improper and illegal classification.

ARGUMENT

POINT I

BETWEEN 1959 AND 1967 THE INS WRONGFULLY DECLINED TO IMPLEMENT THE INVESTIGATOR POSITION CLASSIFICATION STANDARD AS REQUIRED BY STATUTE

The Civil Service Act, in 5 U.S.C. Section 5107 provides that each employing agency of the federal government:

> "*shall* place each position under its jurisdiction in its appropriate class and grade in conformance with standards published by the Civil Service Commission . . . " [Emphasis added]

There can be no question that the word "shall" as used by Congress in the above-quoted section creates an affirmative obligation upon each employing agency in government to assure that its employees are properly classified. In the case of *Brech v. United States Immigration & Naturalization Service*, 362 F. Supp. 914 (SDNY 1973), the court recognized the mandatory nature of the provision and noted:

> "No general rule can be applied except to say that dilatory action by the affected agency cannot be tolerated." (362 F. Supp. at 919)

In October, 1959, the Civil Service Commission promulgated a Position Classification Standard for investigator positions in the Immigration and Naturalization Service. (A.458-467). The standard provided for three non-supervisory investigator grades, GS-9, GS-11, and GS-12. The characteristics of the GS-12 level work were outlined in detail in the standard together with specific examples thereof. In general, it can be said that the GS-12 assignments are those of the most complex and delicate nature involving key public figures, underworld activities, and subversive organizations. Also included are investigations of large document frauds stemming from conspiracy and leading to multiple investigations, and other large-scale, cleverly concealed illegal operations. (A.465-466). There can be no question that

upon the promulgation of this standard it became the *obligation* of the INS to determine which of their investigators were performing at the GS-12 level and to promote them.

Plaintiffs submit that the trial record leaves no doubt that the INS did not comply with the requirements imposed upon it by statute. It is clear that, until compelled to do so in 1967 by the CSC, the INS employed a series of improper tactics in order to avoid having to promote *any* of its non-supervisory investigators to GS-12. The most flagrant of these tactics was the perpetration of the myth that all of the GS-12 level cases were being performed by higher graded supervisors. In a letter to the national president of the American Federation of Government Employees dated July 17, 1963, E. A. Loughran, Associate Commissioner for Management of the INS, stated (A.227):

> "Your recent letter inquires as to whether or not we plan to establish non-supervisory investigator positions at the GS-12 level. When responsibilities occur at that level they are assigned to incumbents of supervisory positions at the GS-12 level. We do not contemplate establishing any GS-12 journeymen positions at this time."

Furthermore, even up to the eve of trial of the present litigation in 1975, the government continued to take the position that any GS-12 investigations which occurred during this period were carried through or directed by supervisory investigators (Defendants Contested Fact No. 6 at A.38).

In contravention of the government's assertion that GS-12 level work was being assigned to supervisors the testimony of virtually every witness at trial establishes that supervisors performed almost no investigations on their own; that they were entirely desk men who never went out into the field; and that such state of affairs was absolutely common knowledge within the Immigration & Naturalization Service. (See e.g., A.567-570, 637, 672, 695, 698-699, 719, 789-790, 799, and 949). Especially significant in this regard is the testimony of Publio Esperdy, New York District Director between the years 1959 and 1970 who testified that it was a "rare occasion" for supervisors to actually perform investigations (A.951). There is no question therefore,

that INS management was aware, or *should have been aware*, of the actual state of events.

In support of the government's defense, which can roughly be summed up as one of "benign ignorance", the government introduced the testimony of one Benedict Ferro, who in 1963 was a *trainee* in the Administrative Division of the INS in Washington. It was not until 1967, that Mr. Ferro was appointed Chief of Classification in INS (A.958). Throughout his testimony he admitted limited recollection of many of the events which had taken place prior to the filing of classification appeals in 1966 (see, e.g. A.980). He did however admit that by "hindsight" that INS's determination that there were very few GS-12 cases was incorrect (A.959-960), and that the Service had relied primarily on various directives and routine reporting procedures to determine what kind of work was being performed and whether or not it was properly assigned. He further explained that when a comprehensive nation-wide review was finally undertaken by INS following the granting of many classification appeals by the Civil Service Commission in 1966-1967, the result was the creation of 45 new GS-12 positions, and the promotion of 45 GS-11 investigators to GS-12 (A.969. See, also, documents at A.474-478, 479-481, 482-487).

In addition to the clear implication that INS knew or should have known that its GS-11 investigators were performing substantial amounts of work at the GS-12 level, the record includes the detailed testimony of appellant Edward Kavazanjian regarding the extensive efforts which were made by the investigators as individuals, and through their collective bargaining representatives, to convince INS management that GS-11 investigators *were* performing at the GS-12 level and were entitled to be upgraded under the standard. These submissions included detailed written documents and oral presentations. (A.572-583). Typical of the dilatory and evasive responses received by INS is a memorandum directed by E.A. Loughran, Associate Commissioner for Management at INS to Mr. Kavazanjian on March 20, 1964 concerning his "classification appeal" (A.99). This memorandum indicates that INS was awaiting the reports and recommendations of the Civil Service

Commission on investigator classification at INS which were expected "sometime this spring". The Civil Service Commission's report and recommendation, however, known as the Googe Report was dated October 31, 1963 (A.100-103). Subsequently, in 1964, the INS informed Mr. Kavazanjian that it was still awaiting the report from the Civil Service Commission, however in the early part of 1965 when Mr. Kavazanjian confronted Mr. Thomas Casey the personnel officer of the INS regarding the appeal which had been made, he was informed that no appeal ever existed so that no answer would be forthcoming (A.574). It is apparent on the basis of the above that INS's reaction to the investigators request for implementation of the standard was both dilatory and made in bad faith, and that because of his almost total lack of recollection of the events occurring during this period, government witness Ferro was unable to contradict the obvious inferences from the testimony and documents before the court (See A.979).

Appellants also submit that undeniable proof that the Immigration Service was *not* meeting its statutory responsibility stems from the *findings* of the CSC in response to the numerous investigator classification appeals which were filed. Of the 52 appeals filed in the New York District alone, 26 were granted by the Commission. (A.997). In fact, as a result of the New York findings, the INS was ordered by the CSC to conduct a classification review to determine which investigators in other districts were performing at the grade GS-12 level (A.492-493). Additional insight on the inexcusable failure of INS to properly classify and compensate its investigative employees is gained from a review of particular cases. A good example is the case of Investigator Axelrod who was one of the 1966 classification appellants. On April 6, 1967, Mr. Loughran informed the Civil Service Commission that "it was determined as a result of this review (by INS) that Mr. Axelrod was spending the majority of his time on cases described as grade GS-11, and that no cases had been assigned him that could be considered grade GS-12 as described in the supplement to the Position Classification Standard for the General Investigating Series." (A.104). However, in its reply to Mr. Loughran, the CSC noted "we found in our review that for the last year Mr. Axelrod has been

spending almost all 85% of his time on a conspiracy case of great magnitude which resulted in the indictment of a practicing attorney." The letter went on to note that Mr. Axelrod had been working jointly with another investigator who was at the GS-12 level whose grade was based mainly on the same conspiracy case, and directed corrective action to classify Mr. Axelrod's position (A.105). It is clear, that this particular case is merely part of a large pattern of conduct on the part of INS to hold investigator grade levels to the minimum.

The final, and perhaps the most startling indication of the degree to which INS failed to comply with its statutory responsibilities is contained in the Macy report of 1967 (A.92-98). This report was made by John W. Macy, Jr., Chairman of the U.S. Civil Service Commission and was based upon a nation-wide inspection of personnel management activities in the Immigration & Naturalization Service. In the covering letter with which the report was transmitted to the Attorney General of the United States, Mr. Macy notes (A.92):

> "The position classification program has been used to keep grades down for employees without regard to the actual level of work being performed. The agency's failure to operate an adequate and effective classification program has resulted in hundreds of employees filing classification appeals with the Civil Service Commission."

The report itself further notes (A.96):

> "The Immigration & Naturalization Service was not meeting its responsibility under the Classification Act of 1949 (now Title 5, Chapter 51 U.S. Code) by carrying on a program that would assure the Commissioner, the Attorney General, and the Civil Service Commission that its obligation to classify jobs accurately under Civil Service Commission standards would be met. Employees tended to rely on appeals to force management to take classification actions that should have been taken on management's own initiative."

The report also noted that there was an "over-dependence" upon written policy, procedures, and standard position descriptions

and that the classification maintenance review program was "ineffective and was not providing the information needed by management". (A.96-97).

On the basis of all of the above, there can be no doubt that the Immigration & Naturalization Service did *not* meet its responsibilities under the Classification Act. In this regard it is respectfully submitted that the trial judge erred in failing to reach such a conclusion as requested by appellants. Furthermore, because the question of INS' lack of compliance with statutory mandate is clearly a mixed question of fact and law, such question is freely reviewable by the appellate court without reference to the "clearly erroneous" standard in Rule 52 of the Federal Rules of Civil Procedure. See *University Hills, Inc. v. Patton*, 427 F.2d 1094, 1099 (6 Cir. 1970); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 267; (3 Cir. 1970) *cert. den* 398 U.S. 905, *Chandler v. U.S.* 226 F.2d 403, 405, (7 Cir. 1955) *Ashland Oil & Ref. Co. v. Kenny Constr. Co.* 395 F.2d 683 (6 Cir. 1968). Accordingly, the Trial Court's failure to find that INS had not met its statutory responsibilities between 1959 and 1967 should be reversed.

II

THE CIVIL SERVICE COMMISSION ADJUDICATED THE 1966 AND 1968 INVESTIGATOR APPEALS IN A MANNER THAT WAS ARBITRARY, CAPRICIOUS, NOT BASED ON SUBSTANTIAL EVIDENCE AND CONTRARY TO LAW.

The statutory authority under which an employee may appeal his grade level classification to the CSC is contained in 5 USC. Sec. 5112 as follows:

> a) Notwithstanding Section 5107 of this title, the Civil Service Commission may
>
> 1) ascertain currently the facts as to the duties, responsibilities, and qualification requirements of a position.

* * *

3) decide whether a position is in its appropriate class and grade, and

4) change a position from one class or grade to another class or grade when the facts warrant.

b) An employee affected or an agency may request at any time that the Commission exercise the authority granted to it by subsection (a) of this section and the Commission *shall* act on the request. (Emphasis added).

It is crucial to note that while the language of subsection (a) is entirely permissive, using the word "may", subsection (b) by using the word "shall" is mandatory, and *requires* that the Commission make an objective evaluation of the correctness of an employee's classification by his agency, and change that classification when warranted. In this regard, Samuel Friedman, the retired Commission official who testified[2] at trial indicated that, as a matter of Commission policy, the CSC views itself as an impartial arbitrator in adjudicating classification appeals, and that the agency and appellants are cast in the roles of litigants before the Commission. In this regard, he stated that budgetary limitations or other factors beyond the scope of the duties and responsibilities of a position were improper for the Commission to consider in making its evaluations (see A.820-821). Whatever may be said concerning Commission's compliance, *in fact*, with this mandate, plaintiffs submit that the above philosophy is a correct statement of the Congressional intent.

At this point in the development of the law, there can be no dispute that the personnel decisions of the Civil Service Commission are as fully reviewable by the courts as the decisions of any other administrative agency. In his decision, the trial judge recognized his jurisdiction to review under the Administrative Procedure Act 5 USC Section 702 and 706 (A.60). Although the trial court referred only to Section 706(2)(A) of the act, which

2. Mr. Friedman who was originally noticed as a witness by the Government was called by appellants as a hostile or adverse party witness and interrogated with leading questions (see A.817). Pursuant to Rule 607 of the Federal Rules of Evidence, a party is no longer said to be bound by or to vouch for the testimony of witnesses called by him

empowers the court to hold unlawful agency action found to be "arbitrary, capricious, an abuse of discretion," or contrary to law, it is also clear that subsection E which refers to reversal of agency action *"unsupported by substantial evidence"* is also applicable to review of CSC decisions. *Charlton v. United States*, 412 F.2d 390 (3rd Cir. 1968), *McEachern v. United States*, 321 F.2d 31 (4th Cir. 1963), *Halsey v. Nitze*, 390 F.2d 142 (4 Cir. 1968), *cert den*, 392 U.S. 939 (1968); *Vigil v. Post Office Department*, 406 F.2d 921, 924 (10 Cir. 1969); *McCourt v. Hampton*, 514 F.2d 1365 (4th Cir. 1975). In light of these and other holdings, it is therefore, no longer correct to refer to the "limited" scope of review as the trial court did herein (A.60). In fact, in *Marrone v. United States*, 500 F.2d 418, (2nd Cir. 1974), a suit challenging civil service classification, this circuit reversed the District Court which had granted summary judgment to defendants and remanded the matter for resolution of the triable issues of fact which existed. Similarly in *Zucker v. Baer*, 262 F.Supp. 528, (SDNY 1967) the Court held that issues raised by plaintiff concerning whether the CSC had given proper consideration to evidence submitted by an employee on a classification appeal, and whether duties actually performed by the employee were at the higher level as claimed precluded summary judgment. Hence, it is apparent that the courts have become as zealous of protecting the rights of those who litigate before the Civil Service Commission as they are of protecting those litigating before the FCC, FTC, FDA, CAB, NLRB, SEC, FAA, or any of the other myriad agencies whose determinations have such a vital impact on contemporary American society.

a) The 1966 Investigator Appeals.

When in July 1966, 52 Investigators in the New York District filed classification appeals with the CSC, it became incumbent upon the Commission to exercise the authority conferred on it by 5 USC 5112. Mr. Samuel Friedman, the CSC official primarily responsible for conducting requisite evaluations testified that it was the largest group appeal he had ever seen (A821). Mr. Friedman further testified that he determined that the appellants could not be treated "as a group because we had to

come to a decision on each of the appellants based on the cases assigned to that appellant, . . . the only way we could arrive at a decision would be to examine the cases assigned to each appellant, we had to talk to them, we had to examine the cases and see the nature of the cases, and then come to a conclusion . . ." (A.826). Mr. Friedman further noted that it would be necessary to "know the time spent on those cases" (A.829).

In determining the percentage of cases necessary for upgrading, Mr. Friedman testified that the Commission had promulgated guidelines to be applied to mixed-grade positions. These guidelines are contained in a document entitled "Position Classification Standards" (A454-457) (not to be confused with A.458-473, which is the classification standard for INS Investigators) which has never been published in the Federal Register or Federal Personnel Manual. The guideline specifies that mixed-grade positions may be classified on the basis of the duties and responsibilities taking up a majority of the employees working time (majority time rule) or, in some instances based upon important higher level duties occupying a *substantial* (but less than majority) portion of the employees working time. (A.457). The latter criteria is known as the substantial time rule, and Mr. Friedman testified that such rule was flexible and generally meant approximately 25% of an employees work time at higher level duties would be necessary for upgrading.

There is no dispute that the CSC applied the majority time rule at all times in New York (A.43). There is however considerable testimony and other evidence to the effect that at the outset of the New York audits, Mr. Friedman announced to the appellants and their representatives that the *substantial* time rule would be applied to their positions. Both appellant Kavazanjian (A.584) and appellant Lazarus (639-641) who were union representatives, testified to a *definite recollection* of Mr. Friedman having expressed an intention to use the substantial time rule at the outset. Additionally, in a memorandum written to the CSC on February 16, 1967 protesting Mr. Friedman's adverse decisions based on the *majority time rule*, Kavazanjian specifically alluded to Friedman's earlier pledge to use the substantial time rule (A.431).

In response to the definite testimonial recollections of two witnesses, and a precise contemporaneous document, Mr. Friedman at trial stated that he had *not* indicated which criter he was going to apply but "*probably* gave them the except (meaning the substantial time rule) and explained under what conditions it would be applicable. (A.853). The use of the word *probably* indicates a clear lack of definite recollection on the part of the witness which contrasts sharply with the definite recollection of two Government witnesses and a contemporaneous document. Hence, we submit that the state of the record warrants no other conclusion than that a change of criteria was imposed in mid-stream, and that the more difficult majority time standard was substituted for the more flexible, less rigorous standard in order to defeat many of the appeals. We further submit that such substitution, as a matter of law, constitutes arbitrary, unreasonable and capricious conduct on the part of the Commission.

Turning now to the actual audits and evaluations which were, in fact, made by Mr. Friedman in the course of his adjudication of the classification appeals on the regional level, we submit that the record demonstrates without question that such evaluations were made in an arbitrary, capricious, and slipshod manner in total disregard of both the facts, and the rights of the appellants whose positions were being audited.

Mr. Friedman's testimony demonstrates that it was *essential* for a fair determination of the appeals that each appellant be desk audited; that the nature of asisgned cases and time spent on those cases had to be precisely ascertained; and that the majority time rule under which the decisions were purportedly made require the application of an exact calculation to determine how much time an employee actually spent on the job during the course of the year, and what percentage of that time had been spent on GS-12 level cases. (A.826-835, 855-859). Although Mr. Friedman's testimony establishes in the most *general* terms that the requisite evaluations and computations were made for all of the appellants (A.855-856), his testimony is remarkably lacking in any specific detail or definite recollection. On the other hand, the numerous appellant Investigators who testified did so from

detailed and specific recollection of what had actually transpired in their particular cases when desk audited by Mr. Friedman or one of his associates.[3]

The testimony of the appellant investigators in this regard may be summarized as follows: Mr. Kavazanjian testified that he was audited by Mr. Friedman in the summer of 1966; that the evaluation took approximately two hours with Mr. Friedman taking detailed notes. (A.586-587). Mr. Kavazanjian also testified that as a union representative he was aware of Mr. Friedman's subsequent progress because the appellants reported to him in his official capacity, and that immediately following the audit of Kavazanjian, Mr. Friedman audited Mr. Lazarus, and subsequently did not return for several months. (A.589); Mr. Lazarus also testified that he was audited for several hours by Mr. Friedman, that copious notes were taken by Mr. Friedman and that following the interview Mr. Friedman indicated to him that all of his cases were at the *GS-12 level* with one exception. (A.638-641); Investigator Flasterstein testified that he was granted merely a five or ten minute interview with Mr. Friedman, that Mr. Friedman insisted that because he was a General Investigator only 40% of Mr. Flasterstein's cases could possibly be at the GS-12 level, and that Mr. Friedman refused to examine the cases which Mr. Flasterstein offered to make available or to evaluate those cases (A.673-675); Investigator Benemio testified that he was audited by Mr. Friedman for approximately ten to fifteen minutes, that Mr. Friedman did not delve into or explore any of the cases which were the subject of the evaluation, that his attitude was one of total disinterest, and that he barely took any notes at all. (A.691-692); Investigator D'Amico testified that he was interviewed by Mr. Friedman for a period of approximately twenty to twenty-five minutes, that Mr. Friedman was not interested in any of the files which he offered to show him, in fact refused to look at them (A.699-700); Investigator Burke testified that his interview with Mr. Friedman lasted about twenty minutes, that Mr.

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3. We note that INS Investigators are frequently called upon to testify in criminal prosecutions, and the Government's case often depends on the accuracy and reliability of their testimony.

Friedman did not look at any of his files or discuss time spent on cases with him (A.755-756). Investigator Roland testified that he was interviewed by Mr. Scheiner, one of Mr. Friedman's associates, that the auditor had a three inch by five inch index card in front of him; that Mr. Scheiner did not ask about the time spent on cases nor did he look at any files, and that at the end of the interview there were no words or notes written on the index card on which Mr. Scheiner had been merely doodling (A.772-775); Investigator Ricciardi testified that he was interviewed by Mr. Friedman at which time he made an oral presentation, and that following the interview Mr. Friedman informed him that he would have "no trouble". (A.812-814); Investigator Honan testified that he was interviewed by Mr. Friedman for about forty-five minutes, that the discussion was a general one during which time Mr. Friedman merely glanced at one case casually, and that Mr. Honan was not given the opportunity to discuss particular cases which he had brought with him (A.794-795). Investigator Zutty testified that he was interviewed by Mr. Friedman for only fifteen minutes, during which time *no* individual case was discussed, and that there was merely a fast review of the type of work done. In his letter of appeal, Mr. Zutty pointed out that Mr. Friedman had spent only fifteen minutes with him in an attempt to evaluate his cases. (A.799-804).

The arbitrary and haphazard manner in which the Civil Service Commission conducted the evaluations entrusted to it by Congress is further demonstrated by testimony related to the total absence of files on the appeals, and the disorganized and incomplete state of the so-called "administrative record". In a letter dated February 16, 1967, L.H. Baer, the Regional Director of the CSC in New York informed Mr. Lazarus that each decision which had been made had been based on an individual desk audit and on an "individual analysis of duties and responsibilities", and that "any appellant is welcome to examine his entire file in our office" (A.205). The testimony of the Investigators, however, indicates what happened when the appellants took the Commission at its word and attempted to review the material in their files which had formed the basis for adverse decisions in their cases. Mr. Kavazanjian testified that

during the first week of March, 1967, he and several other investigators went to the office of the Civil Service Commission in order to review their files. Prior to such visit an appointment had been made with Mr. Baer who stated that their appeals files would be available for review by all appellants who wished to ask for re-consideration. At the time of this visit the investigators spoke with Mr. John Sauerhoff, the Chief of Management Personnel Evaluation who set aside an area for the appellants to review their folders, presented each man with a folder and walked away. Mr. Kavazanjian testified that there was *nothing* pertinent to his appeal contained in the file. When Mr. Kavazanjian confronted Mr. Sauerhoff with the virtually empty file, he was told "everything that was used and everything that is the basis of your decision is in that folder. That's your appeals folder." Mr. Kavazanjian went on to explain that the folders of the other investigators who accompanied him were also either completely empty, or totally without any meaningful or relevant material. (A.595-599). The testimony of Mr. Kavazanjian was corroborated by the testimony of several other investigators who also were unable to review any meaningful material in their files. (Benemio: A.693; D'Amico: A.701; Lazarus: A.643).

In the decision herein, the trial judge commented on the unavailability of files by noting "the *apparent* reason for this phenomenon is that the important papers in the files were in transit, or located in Washington for consideration of the second level appeals before the time the appellants sought to view them in New York" (A.67-68). [emphasis added] Appellants note that because of the way in which the statement is phrased, it cannot be regarded as a *finding* of fact on the part of the trial court. Additionally, because there is no evidence in the record to demonstrate what happened to the missing files and notes (assuming they ever existed) the trial court's statement is based entirely upon surmise and speculation. It is well established that findings based on speculation and conjecture will not be sustained. See *Solomon v. Northwestern State Bank*, 327 F.2d 720, 723 (8th Cir. 1964). Additionally we note the trial judge's explanation is totally inconsistent with the testimony of record to the effect that Mr. Kavazanjian and others were *invited* to the Commission offices in New York by a high Regional official for

the specific purpose of reviewing their files, and that another high Commission official assured them that what they had before them were, in fact, their complete appeals files which contained everything forming the basis for the decision.

Appellants also refer to the state of the documents which the government has filed with this court as an "administrative record". These documents were received in evidence as defendant's Exhibit A through F in exactly the form in which they were certified by appropriate Commission officials. The bulk of these documents are contained in the index on appeal herein in pages A.174 through A.450. It is apparent from even a quick perusal of this material that it constitutes an almost random, disorganized conglomeration of hundreds of documents relating to INS Investigator appeals. As the trial judge himself noted "whoever put these files together certainly did not exercise chronological discretion" (A.942). We submit that the court's comment was an *understatement*. It is especially interesting to note from these documents the *total absence* of any of the detailed audit notes which Mr. Friedman claimed that he made with the exception of those relating to appellant Kavazanjian and Lazarus, the very first two appellants to be audited. Interestingly enough, these audit notes were not discovered by the government and furnished to the investigators until May 7, 1974 (A.438-450).[4] The absence of the auditor's notes and calculations, which according to Mr. Friedman were *essential* for a fair and proper determination, is especially inexcusable in light of the fact that many of the Investigators had requested at the time of the appeals that the auditor notes be preserved (A.171, 201, 814). Also interesting to note is the fact that when Mr. Friedman was confronted with his audit notes for appellants Kavazanjian and Lazarus he admitted that they did *not* contain the kind of precise calculations which he had previously testified were absolutely necessary for a fair determination (A.857).

Even more light is shed on the situation by Mr. Kavazanjian's

4. The notes in A.340-365, were those made by a representative of the Bureau of Inspections during the second level review and not by Mr. Friedman.

conversation with Mr. Friedman following the denial of his appeal, and total absence of meaningful files at the Commission. In his letter to Mr. Lazarus of February 16, 1967, in which he had invited him to review his file at the Commission, Mr. Baer, Regional Director, also stated "Mr. Friedman will be glad to discuss your case with you" (A.205). However, when Mr. Kavazanjian inquired of Mr. Friedman regarding the basis of the denial, he was told that the information was contained in the appeals folders; that Mr. Kavazanjian had not been doing a majority of work at GS-12; that Mr. Friedman did not have to tell him what percentage of GS-12 work he was in fact doing; and that Mr. Friedman did not have to explain *how* he reached his mathematical conclusion because he was an "expert on classification" (A.593-594).

We respectfully submit that what emerges from virtually all of the testimony and exhibits of record is that the audits that were done in late 1966 by Mr. Friedman and the New York Region of the Civil Service Commission were entirely arbitrary and disorganized. It appears that only the first two interviews, Kavazanjian and Lazarus, were done with any degree of dilligence, and that these audits were followed by a long delay, and a series of inadequate, unrecorded conversations.

The conclusion that proper evaluations were not done is more than borne out by the results of the appeals. The appeal of Mr. Lazarus who had been told by Mr. Friedman that ten of his eleven cases were at the GS-12 level, was *denied* (A.210). Similarly, Investigator Kavazanjian whose work at the GS-12 level under the standard was definitely established by Mr. Friedman's audit notes (A.438-445) and who was eventually promoted following appeal to the Bureau of Inspections, also received an initial denial from Mr. Friedman (A.40). Mr. Burke who was eventually promoted to GS-12 on the basis of a letter from Mr. Esperdy (A.517) also received an initial denial from Mr. Friedman. Mr. Ricciardi who had been assured by Mr. Friedman that he would "have no trouble" following his two-hour audit, also had his appeal *denied.* (See A.812-816).

Of particular interest is the result of the appeals filed by investigators in the Subversive Unit in New York. The work of this

unit deals exclusively with high level subversive matters of exactly the kind described in the GS-12 description in the Position Classification Standard (See A.179-185, 465-467). Mr. De Vito, the one investigator in the Subversive Unit who was successful in his appeal to the Commission testified in great length that *all* investigators in the Subversive Section had the same kinds of cases, which were assigned without reference at all to level of difficulty; and that there was, therefore, no rational basis for his being singled out for promotion to GS-12 upon his appeal to the Civil Service Commission (A.720-722). Similarly Investigator Zutty, another member of the Subversive Section confirmed the fact that *all* men in the unit received their cases from the same source without respect to difficulty and that he had personally heard Mr. Weinman, Chief of the Section, tell the Commission auditor that all men in the squad were doing essentially the same work (A.799-804).

One final example of the total arbitrariness of the results of the 1966 classification appeals is furnished by the case of Investigator Sena. On February 1, 1967, Mr. Sena received a letter of denial stating that the Commission had not found that GS-12 cases occupied a majority of his time (A.109-110). This result was affirmed by the Bureau of Inspections in Washington on June 9, 1967. (A.111). On August 25, 1967, Mr. Loughran, the Associate Commissioner for Management of the Immigration Service (the same individual who had previously asserted that all GS-12 level work had been assigned to supervisors) indicated in a memorandum to Mr. Sena that the Service had no disagreement with the Commission's decision in his case, and that the 26 investigators who had been promoted as the result of their classification appeals would adequately handle all the grade GS-12 level work in New York. (A.112-113). On January 19, 1968, Mr. P.A. Esperdy, New York District Director, in a memorandum to Mr. Sena regarding position classification noted:

> "I have very carefully considered the resume presented by you and I've had the necessary discussion with your supervisors. It is my conclusion that for the period in question you devoted better than 50% of your time to investigative work which is at the GS-12 level. It

> is my opinion that reaching the conclusion that your work was at the GS-11 level was *wholly in error.* I am completely unable to perceive how such a conclusion could have been reached when at the same time a favorable decision allocating GS-12 positions were made in the cases of Investigators Ricciardi, Kavazanjian and Lazarus. If the GS-12 standards were applied to their work as it was done and they were found to fall adequately within the GS-12 level, then it is inescapable that by using the same measures they should have found you entitled to GS-12 classification . . . a more serious study in depth of your responsibilities and activities should have awarded you the higher classification. (A.114-115).

As a result of Mr. Esperdy's intervention, Mr. Sena was ultimately promoted to GS-12.

Turning to the evaluations on appeal which were subsequently done by Mr. Van Tassell of the Commission's Bureau of Inspections, it is clear that, as to those investigators who were *not* promoted, none of the inadequacies and omissions of Mr. Friedman's earlier evaluations were corrected. The record is clear that, although the Bureau of Inspections was an appellate body charged with reviewing the correctness of the earlier decisions of the New York Region, Mr. Friedman continued to inject his views and determinations into the decision-making process by conferring with, and giving his opinion to Mr. Van Tassell, whose responsibility it was to make the appellate determinations (A.875-880). In fact Mr. Friedman characterized the appellate decision-making process as a "partial team analysis" by him and Mr. Van Tassell (See A.880-881). This statement is readily confirmed by reference to Mr. Van Tassell's notes which contain frequent reference to oral statements by Mr. Friedman. (A.340-365). We respectfully submit that these discussions between Mr. Van Tassell, an appellate officer acting in a definite quasi-judicial capacity, and Mr. Friedman, the lower level officer whose adjudications were being reviewed, constituted a flagrant and inexcusable violation of administrative due process of law. See, *Murray A. Brown v. United States,* 377 F. Supp. 530 (ND Tex. 1974).

On the basis of all of the above, we respectfully submit that the negative determinations made by the Civil Service Commission as a result of the 1966 appeals were arbitrary, capricious, and not based upon substantial evidence. The letters of decision (See A.143-156, 107-110, 210-213) are clearly boiler plated form letters which contain no meaningful calculations or percentage figures, no meaningful analysis of individual cases, and no possible basis for determining the manner in which adverse determinations were reached. We believe that the essential error made by the District Judge was in *presuming* good faith without the government first coming forward with an administrative record demonstrating substantial evidence to support its adverse determinations. We respectfully submit that, *as a matter of law*, the disjointed and random documents supplied by the government, together with references to phantom files and non-existent calculations do not provide a basis for judicial affirmation of the administrative conduct brought into question. We also respectfully submit that, *as a matter of law*, the record demonstrates the kind of arbitrary, capricious, and unreasonable conduct which should be set aside.

b) The 1968 General Investigator Appeals

In June, 1968, a group of sixteen new classification appeals, seeking promotion of investigators from GS-11 to GS-12, were filed by investigators in the General Investigation Section in New York. Five of the named appellants, Costas, Flasterstein, Greenfield, Martin, and Opolion were included in the group. On November 8, 1968, these appeals were denied by the Civil Service Commission. The appellants maintain that the record demonstrates conclusively that, in the course of adjudicating the 1968 classification appeals in question, the CSC totally abdicated its important statutory responsibilities in favor of the INS. A substantial factual issue arising at trial was whether or not the Civil Service Commission had itself performed work audits of the appellants, or whether the only audits done were those performed by the "classification experts" of the INS. The Government took the position throughout the trial that CSC classifiers had, in fact, made the audits. Interestingly enough,

although this important question of fact was placed squarely before the trial judge for determination, no factual finding was made by him regarding the issue. Instead, the court stated (A.75):

> "There was some confusion about the auditing process involved in the adjudication of the classification appeals filed in June 1968. The INS in order to prepare its input into the classification appeal process, attempted to audit the work of appealing investigators. The investigators, or some of them, apparently viewing the INS as their adversary in the classification appeals, refused to speak to the INS classifiers, though they allowed them to review the cases on which the appellants had been working."

Accordingly, there is no finding of fact (other than the finding that there was some *confusion* with which we do not disagree) to which the "clearly erroneous" standard of Rule 52 of the Federal Rules of Civil Procedure is applicable. We further note that the evidence is sufficiently straightforward and compelling for the Appellate Court itself to reach a determination upon the record that no CSC audits were in fact made.

It should be remembered in this regard that Mr. Friedman testified in connection with the 1966 audits that he had determined that individual desk audits by the Commission were absolutely *essential* for a proper determination of the multiple investigator classification appeals which had been submitted. (A.826). Common sense indicates that there was no reason to assume that such individual desk audits by the CSC were any *less* necessary in adjudicating the new group of appeals filed in 1968, many of which were by totally different investigators.

The record made at trial establishes the following: On December 15, 1967, a memorandum was sent by INS to all District Directors attaching a copy of a Civil Service Commission *internal* memorandum indicating that the resources of the Commission were not sufficient to provide for individual desk audits on investigator classification appeals and that INS would, in the future, be carrying the major burden of gathering in-

formation to the Commission. (A.1015-1017). While there is no explanation at all in the record as to why an *internal* Commission memo was openly circulated within the Immigration Service, it is clear that the Commission had already determined at the time the 1968 appeals were filed, that it was not going to burden itself with desk audits. Following the filing of the sixteen appeals in 1968, the record clearly indicates that INS, after corresponding with the CSC, undertook to do its own site audits in connection with the pending classification appeals. That correspondence, and the results of the INS audits which were furnished to the Civil Service Commission are contained in the administrative record filed by the government (A.259-260, 302, 303, 304, 523, 261-265). The final document containing INS' findings regarding its own employees is entitled "Evaiuation Statement, 14 General Investigators GS-1810-11, General Section, New York District Investigations Branch" and is found in pages A.261 through A.265 of the Appendix.

In further support of appellants' position, Investigator Flasterstein testified that, as an appellant in 1968, he was not audited at all by any CSC official; Investigator Opolion testified that, as an appellant in 1968, he was ordered to submit to an audit by INS classifiers, and that he and others refused to do so because they believed that the Civil Service Commission was the administrative body to whom he had appealed; and that as a result of this refusal he had an approximately 5-minute chat with Mr. Samuel Friedman who came to see him in the fall of 1968 in order to determine why the appellants were not willing to submit to INS audits. (A.732-735).

When questioned about the occurrence or non-occurrence of CSC audits in connection with the 1968 appeals, Mr. Friedman, who had professed a clear recollection of the events of 1966 which took place two years earlier, admitted that he had no independent recollection of audits being done by CSC personnel in 1968 (See A.895 through A.896). Mr. Friedman nonetheless asserted that audits were, in fact, made by INS personnel, basing his assertion upon a Civil Service Commission log (A.549-553) and the various letters of decision, all of which used the term "work audit" (A.244-256) which Mr. Friedman interpreted

as meaning a desk audit done by Civil Service Commission personnel. (A.891-894). Mr. Friedman had no explanation for why the results of the audits, which he claimed were done by the Civil Service Commission in 1968, were not part of the administrative record, while the self-serving, in-house audits supplied by the INS—an interested party—were included.

We respectfully submit that the almost unintelligible notation contained in the Civil Service Commission log (A.548) and Mr. Friedman's belated interpretation of the term "work audit" as used in the letters of decision, do not provide a sufficient evidentiary basis for disregarding the testimony and documents previously referred to, which lead to the inescapable conclusion that the CSC authorized the INS to do desk audits *in its stead.* We respectfully submit that this action on the part of the Civil Service Commission constituted a flagrant and unjustifiable denial of due process of law to the appealing Investigators. The Commission, having been placed in the role of an impartial arbitrator of classification disputes between employees and their employing agencies, had no discretionary right to delegate back to the employing agency an essential part of the adjudication function. Additionally, even assuming that the government's theory were true, it would be inexcusable for the Commission to base its determinations on audits made by Commission personnel the results of which were not included in the formal administrative record.

On the basis of the above, it is respectfully submitted that the Commission's decisions on the subject classification appeals in 1968 were arbitrary, capricious, unreasonable, and not based on substantial evidence, and should be set aside by this Court.

c) Appeal of Peter Scalcione

On February 27, 1968, Investigator Scalcione filed a separate classification appeal. In his letter of appeal (A.377), Mr. Scalcione referred to an important case, known as the "R" case[5]

5. Although the names of the actual individuals who were the subject of various investigations are mentioned in the documents received in evidence, for the purposes of protecting involved individuals, the parties have agreed to designate the subjects of investigation entirely by initials.

which had been assigned to him in November of 1966 and which occupied in excess of 75% of his time. The record indicates that the "R" case, which ultimately developed into 61 collateral cases under Mr. Scalcione's management, involved a complicated international conspiracy of exactly the kind described in the investigator standard as being at the GS-12 caliber (A.783-784, 465-467). Mr. Scalcione's testimony establishes that he was contacted by a Civil Service Commission employee with whom he had a relatively brief discussion. During the course of the discussion this individual merely stated that the "R" case was "borderline" and made derogatory statements concerning what he described as the New York "malaise" of getting ahead. The Commission's representative also noted to Mr. Scalcione that he was merely a GS-9 Civil Service Commission examiner. (A.786-788). Yet, he was assigned to evaluate the performance of a GS-11 employee seeking promotion to GS-12.

The letter of decision resulting from the Civil Service Commission's deliberations is contained in page 369-370 of the Appendix. The rationale by which the Commission attempts to justify its failure to promote Mr. Scalcione is literally incomprehensible. Initially the letter notes that the "R" case was considered borderline between GS-11 and GS-12. There is absolutely no explanation of what makes a case "borderline", and why the complicated "R" conspiracy investigations was only a "borderline" case. It is interesting to note that none of the other Commission decisions filed with the court in connection with this litigation uses the term "borderline" in any connection whatsoever. The Commission further notes that borderline cases such as the "R" case are to be assigned to GS-12 investigators, and ignoring the obvious contradiction implicit in its reasoning process, the Commission concludes that the "R case (upon which Mr. Scalcione had been working over 14 months) could not be considered a "recurring assignment and cannot be used in evaluating your position." No more flagrant example of specious reasoning could possibly be devised. The whole theory of adjudicating a classification appeal is that *if* the Commission finds that work being performed for a majority or substantial portion of an employee's time is at a higher level, that employee must be given the grade level at which he is working. Here we have a case upon which the Commission places the label

"borderline" together with the admission that it is a kind of case given to Grade GS-12 investigators, and then concludes because it is the sort of case given to such GS-12 investigators, and Mr. Scalcione is a grade GS-11, it cannot be considered a "regular and recurring" part of his duties. We respectfully submit that such expert use of bureaucratic circumlocution has no place in our present legal system. There can be no doubt that in the case of Mr. Scalcione, the Commission was proceeding in a non-objective result-oriented fashion which it had sought to conceal through the clever manipulation of meaningless phrases and elastic concepts. We submit that the action of the Commission in the case of Peter Scalcione should be summarily reversed by the court.

D) Classification Appeal of Joseph D'Amico

On April 9, 1968, appellant Joseph D'Amico filed a second classification appeal. In his letter of appeal, Mr. D'Amico stated the following (A.389):

> "I wish to call your attention to the fact that I am now assigned a number of complex GS-12 level fraud investigations and that the Immigration & Naturalization Service will undoubtedly attempt to remove these cases from my responsibility in order to deny me my proper grade classification."

The administrative record and the trial testimony leave no doubt that at the time of his appeal to the Commission on April 9, 1968, Mr. D'Amico had been assigned a complex multiple conspiracy case, involving an attorney, known as the "S" case. (A.392-398, 703-708). This case had been assigned to D'Amico on October 4, 1967, and had been thoroughly developed by him, and was under his exclusive control. (id). In January, 1967, Mr. D'Amico had written a memorandum on the case which was presented to his first-line and second-line supervisors advising them of the complex and increasingly involved nature of the "S" case. (A.706). Following this report, the case remained under Mr. D'Amico's control, and on April 25, 1968, Mr. D'Amico submitted a more complete report on the status of the "S" case to his supervisor (A.397). On May 10, 1968, shortly following the filing of Mr. D'Amico's classification appeal to the U.S. Civil

Service Commission, based in large measure on the "S" case, which Mr. D'Amico calculated involved over 70% of his time, the INS removed the "S" case from Mr. D'Amico's assignments, and re-assigned it to a GS-12 level investigator. At the time of such removal, D'Amico's supervisor, Louis Kaye, explained that the "S" case was definitely a GS-12 level case, and consequently, it would have to be assigned to a GS-12 level investigator. At such time, Mr. Kaye further explained that the detailed 25-page report on the matter which had previously been prepared by Mr. D'Amico was not going to be used, and that all copies of the report except the original were to be destroyed. When Mr. D'Amico subsequently saw the original report he noted that a line had been drawn through it. (A.397, 705-706). On May 16, 1968, Mr. D'Amico directed a letter to the Civil Service Commission in the nature of an adverse action appeal. This letter protested the removal of the "S" case during the pendancy of his appeal, when that case had been under his continuous control since October 4, 1967. (A.380).

On June 12, 1968, the Civil Service Commission issued a letter of decision in Mr. D'Amico's classification appeal. (A.378-379). The letter was divided into two parts, the first discussing and denying the classification appeal, and the second part constituting a rejection of the "adverse action appeal" which had been filed on May 16, 1968. The two paragraphs of the decision letter disposing of the classification appeal consisted of generalized statements, without reference to any specific cases, discussing what the Commission considered to be the GS-11 nature of Mr. D'Amico's case work. There was no mention of the "S" case, which, at that point in time, had been reassigned to a GS-12 level Investigator, and there was no indication of whether or not the "S" case had been considered in reaching an adverse determination on Mr. D'Amico's classification appeal. The letter then went on to indicate that no "adverse action", as defined in the Commission's regulations, had resulted from the removal of a case from Mr. D'Amico's assignments, and that consequently, his adverse action appeal would have to be rejected.

We respectfully submit that the record leaves no doubt that the Commission declined to consider, or give any weight to the

"S" case in adjudicating Mr. D'Amico's classification appeal. It is clear from the reassignment of this case to a GS-12 level investigator on the ground that it *was a GS-12 level case*, and from the fact that Mr. D'Amico unquestionably spent better than 70% of his time on its from October, 1967 until the time of his appeal (A.704), that if the Commission *had* considered the case it would have been compelled to promote Mr. D'Amico to grade GS-12 under any proper application to the Position Classification Standard. Additionally, it is also reasonable to assume that if the Commission *had* given consideration to the "S" case, which had been the subject of considerable correspondence and discussion, it would have made some reference to the case in its letter of decision.

In the decision herein the trial court noted:

> "If the CSC did not consider the work D'Amico, or others similarly situated were doing at the time of appeal, it is arguable that the CSC would have violated its responsibility under 5 U.S.C. 5112(a)(1) and (b) . . . However, it has not been proven that the CSC did not consider the work that D'Amico, and others similarly situated, were doing at the time of appeal. There was testimony by Mr. Friedman that there was no CSC policy not to consider work taken away from an appellant before his audit but after his appeal." (A.73-74).

We respectfully submit that there is no basis at all stemming from Mr. Friedman's testimony to support the conclusion, either that there was no CSC policy not to consider work taken away from an appellant, or that such work was considered in the case of Mr. D'Amico. We note that Mr. Friedman at *no* time testified to any familiarity, or any recollection of, the D'Amico classification appeal of April, 1968. Additionally, Mr. Friedman's testimony regarding the general approach he took is somewhat unclear and inconsistent. Initially, Mr. Friedman stated that when work was removed from an appellant prior to audit, if it wasn't "a part of the employee's current assignment, we didn't give it much weight, we couldn't consider them. We had to consider what was actually in the appellant's assignment." (A.903). After further cross-examination, however, Mr. Friedman stated "I'm trying to recall what we did and I think we would give him credit for that work." (A.905). Subsequently,

following the luncheon recess, and after being confronted with a letter from the CSC to the INS dated July 9, 1969 (A.89-91) stating that it is unfair for an agency to act upon maldistribution of work solely when an employee files a classification appeal, Mr. Friedman stated that when he did audits, he would give employees credit for all work done—even work which had been taken away—for a period of approximately nine months to a year. (A.910). In this regard, Mr. Friedman noted that there was no official Commission policy on the issue, and that it was a matter left to his individual judgement (A.909). It appears, therefore, that Mr. Friedman's testimony in this regard adds nothing to the record but confusion and inconsistency. We also submit that Mr. Friedman's statement to the effect that there was no official policy on the matter is particularly hard to understand in light of the letter of decision in the case of Investigator Scalcione (discussed in the previous section) (A.369-370) which stated that an appellant could not be promoted on the basis of higher level work unless that work was a "recurring assignment" and that the fact that such cases were currently being assigned to GS-12 level investigators precluded such finding. Accordingly, it is clear that if in the case of Investigator Scalcione, the Commission was not willing to consider a case which was *not* taken away, on the ground that in the future such cases would be assigned to higher level Investigators, the Commission certainly would not have been willing in the case of Investigator D'Amico to consider a case which had *in fact* been taken away. Hence, the record presents a clear situation in which an investigator performing higher level work, appealed to the Commission for a higher Civil Service grade based on that work, the employing agency removed the work subsequent to his appeal but prior to the Commission's evaluation, and the appeal was denied.

We respectfully submit that regardless of the motive of INS in removing Mr. D'Amico's higher level work—a motive which is certainly suspect—the Civil Service Commission acted arbitrarily and capriciously in refusing to consider and give credit to Mr. D'Amico for the work which had been removed from him.

Pursuant to the provisions of 5 U.S.C. Section 5112, the Civil Service Commission is empowered to adjudicate a request for a higher grade level classification by Civil Service employees. The

statute in pertinent part provides:

> "Sec. 5112. General authority of the Civil Service Commission: (a) Notwithstanding Sec. 5107 of this title, the Civil Service Commission may—
>
> (1) ascertain *currently* the facts as to the duties, responsibilities and qualification requirements of a position;
>
> * * *
>
> (3) decide whether a position is in its appropriate class and grade; and
>
> (4) change a position from one class or grade to another class or grade when the facts warrant.
>
> * * *
>
> (b) an employee affected or an agency may request at *any time* that the Commission exercise the authority granted to it by subsection (a) of this section and the Commission *shall* act on this request. (emphasis added.)

The statutory language and sentence structure quoted above leaves no doubt that Congress intended the employee's appeal under subsection (b) and the Commission's evaluational audit under subsection (a) to be concurrent in fact. This is apparent both from the use of the words "at any time" and "shall" in subsection (b) indicating a mandatory duty on the part of the Commission, and the combination therewith of the word "currently" in subsection (a). Because subsection (b) effectively triggers subsection (a) upon the filing of a classification appeal, it is patent that Congress intended that the Commission evaluate a Civil Service appellant's position at *the time of appeal;* and not at the time of some future evaluation. While it is, of course, true that the Commission cannot audit a position *eo instante,* it is certainly inconsistent with express Congressional intent for the Commission to refuse to consider duties performed by incumbents at the time of their appeal. There can be no doubt, therefore, that the law, as drafted by Congress mandates that the Commission evaluate a position in a reasonable time after appeal, and that it consider all functions performed at the time of appeal when such evaluation is made.

In the case of *Regis Adams, Jr. et al v. U.S. Civil Service Commission,* civil action No. 359-72 (District Court of the District of Columbia, decided Nov. 9, 1973, cited by the trial Court at A.73) the Commission had declined to consider work

removed from classification appellants by the Bureau of Customs subsequent to their appeal but prior to their evaluation. The court, in remanding the case to the Civil Service Commission, made the following conclusions in its order:

> "It appearing that the CSC did not determine or consider the duties and functions performed by plaintiffs at the time they filed their adverse and classification appeals: and
>
> It further appearing that 5 U.S.C. Sec. 5112(a) (1) empowers the CSC to "ascertain currently the facts as the duties, responsibilities and qualification requirements of position" when requested to do so by a federal employee entitled to invoke the provisions of this section;"

The court then ordered the Civil Service Commission to adjudicate plaintiffs' appeal by:

> "3 . . . giving proper weight to the duties and functions performed by plaintiffs *at the time they filed their appeals* and to all grade determining criteria in effect at such time." (Emphasis added)

We respectfully submit, therefore, that there can be no doubt that the Commission acted arbitrarily and capriciously in refusing to consider the important case which had been taken away from Mr. D'Amico. We also submit that the INS acted improperly in taking the work away from Mr. D'Amico while his classification appeal was pending. As the Director of the Commission's Bureau of Inspections noted to the Personnel Director of the Immigration Service in a letter dated July 9, 1968 (A.89-91):

> "When matters such as maldistribution are acted on only when an employee files an appeal based on a long period of time performing higher grade work, equity is not served, because it denies the employee pay for work asigned from or with the consent of management."

Furthermore, there can be no doubt that the classification appeal procedure provided by statute and by Commission regulation is designed to create definite rights running in favor of Civil Service employees who are improperly classified. It is also clear that such statutory rights are effectively defeated when an employing agency is permitted to remove duties during the

course of a classification appeal without an avenue of recourse being open to the aggrieved appellant. Permitting an agency to remove duties only after an appeal is filed effectively permits that agency to ignore the important clasficiation rights permitted by statute.

For all of the above reasons, the action of the CSC and the INS in Mr. D'Amico's case should be set aside.

III

THE CIVIL SERVICE COMMISSION, BY APPLYING THE "MAJORITY TIME" RULE IN THE NEW YORK REGION AND THE "SUBSTANTIAL TIME" RULE IN OTHER PARTS OF THE UNITED STATES, VIOLATED THE INVESTIGATORS' RIGHT TO RECEIVE EQUAL PAY FOR PERFORMING SUBSTANTIALLY EQUAL WORK.

The most fundamental right of every Federal Civil Service employee is the right to receive equal pay for performing substantially equal work. 5 U.S.C. Sec. 5101.

The statute, in pertinent part states as follows:

> "It is the purpose of this chapter to provide a plan for classification of positions whereby—
>
> (1) In determining the rate of basic pay which an employee will receive—
>
> (A) The principle of equal pay for substantially equal work will be followed; and
>
> (B) Variations in rates of basic pay paid to different employees will be in proportion to substantial differences in the difficulty, responsibility and qualification requirements of the work performed . . .

The legislative history of this section of statute reveals the following:

> "Section 101: this section states the general policy of the bill; mainly, to provide a plan for classifying positions and fixing salaries, under which (1) there should be equal pay for equal work, and proportionate pay for unequal work . . . " (U.S. Code Congressional and Administrative News, 1949, Vol. 2, p. 2366).

In *Barnett v. United States*, 174 F. Supp. 907 (D. Hawaii, 1959), affirmed, 289 F.2d 939 (9th Cir. 1959), the District Court stated:

> "Simply put, the purpose of the Classification Act of 1949, as amended, is to insure equal pay for equal work . . . (at 909).

The legislative history and the plain meaning of the statute stand unequivocally for the proposition that if two federal employees are performing substantially the same work, no matter where they are, they should be paid the same salary. We respectfully submit that the United States Civil Service Commission clearly violated this statutory mandate by the manner in which it adjudicated the investigator classification appeals filed within the New York region. There is no dispute that the Commission applied the "majority time" rule in New York, while in other areas of the country such as El Paso, Texas, the Commission applied its "substantial time" rule. (A.89-91, 131, 132, 162, 431-435, 454-457, See Statement of Uncontested Fact No. 17 at A.43). Under this dichotomy, an investigator in New York seeking upgrading from GS-11 to GS-12 would have to show at least 51% of his time spent on a higher graded work, while an investigator in those areas of the Southwest to which the "substantial time" rule was being applied needed only show a substantial amount of his time (approximately 25%) spent on higher graded work. When questioned, with regard to the two different standards Mr. Friedman agreed that, where the "substantial time" rule is applied in one area of the country, and the "majority time" rule in another area, investigators performing exactly the same work receive different rates of pay. (A.844-845). Mr. Friedman also stated that the Commission's authority for applying two standards stemmed from a document entitled "Position Classification Standards (A.454-457) which had been promulgated by the Commission, but is not contained in the Commission's Regulations, or in the Federal Personnel Manual.

We respectfully submit that no meaningful justification has been shown for the Commission's flagrant and unabashed violation of the principle of equal pay for substantially equal work. The Commission's internal guideline (454-457) provides no meaningful guidance in this regard. The guideline begins by

stating "only general guides can be offered because of the fact that mixed-grade positions occur under so many different circumstances. In classifying the great majority of positions the principal duties and responsibilities will govern; i.e., those that take up at least a majority of the employee's working time. (A.456-457). The guide then goes on to define the "substantial time" rule as follows:

> "Sometimes, however, a mixed-grade position may involve a set of duties and responsibilities or a task which, although enhancing the relative value of the job, and paramount in influence or weight, does not consume a majority of the employee's time. In that event, the position may be classified on that basis.
>
> Since in such instances the basis for the grade is something less than a majority of the employee's working time, the following conditions should be observed:
>
> (1) The duties and responsibilities serving as the basis for the grade decision are paramount in influence or weight, occupy a substantial portion of the employee's working time, are a regular or recurring part of the job, and are not of an emergency, infrequent, incidental, or temporary nature.
>
> (2) They are so different from the other duties and responsibilities as to require materially higher qualifications, which are, or will be, reflected in the qualification standards used in recruiting, testing, and selection. (A.457)

It is clear that nothing in the above-quoted language provides the slightest basis for distinguishing New York Investigator performing higher level duties for a substantial portion of his time, from investigators in other areas of the country performing similar duties. In each instance the higher level duties would be regular and recurring, not of an emergency or infrequent nature, and in each instance they would clearly be so different from the duties and responsibilities of lower graded cases as to require materially different qualifications. Accordingly, even if we are to use the Commission's guideline, there is no basis for the agency's refusal to apply its substantial time concept in New York.

The apparent justification for the Commission's use of the "substantial time" rule in the southwest is contained in a letter from Alvin W. Norcross, Acting Director of the Commission's

Bureau of Inspections to the Director of Personnel of INS, Kenneth J. Stallo, dated July 9, 1968 (A.89-91). This letter attempts to distinguish the situation in the Southwest from that in New York by indicating that investigators in the former are assigned to a geographical area and must handle the "mine-run of work" in that area. In effect, what the letter is saying is that the assignment of work to particular individuals can be controlled by management in New York but cannot be controlled by management in the Southwest. This distinction, however, has been thoroughly refuted by the testimony and exhibits of record. On November 1, 1968, a memorandum was distributed to all District Directors and Officers in Charge in the Southwest Region of the Immigration Service by the Deputy Regional Commissioner (A.119-120), which refers back to earlier directives of 1963 and 1964 (A.121, 122, 130). These memoranda provide proof-positive that INS *can* assign cases by level of difficulty in the Southwest region, including El Paso, Texas, (the location most often referred to in connection with the "substantial time" rule), according to *level of difficulty* irrespective of any concept of geographical assignment. The failure of the government to at any time explain these memoranda in terms of its rationale for the disparity of treatment of New York appellants, indicates the clear error of the assumption that conditions in El Paso and other areas of the Southwest presented a different situation vis-a-vis management's ability to properly assign work. Additionally, the testimony of Investigator Kavazanjian who has worked extensively both in the New York Region and areas of the Southwest where the substantial time rule has been applied indicates that there is no difference in the work situation in New York and the other areas of the United States referred to. (A.609).

On the basis of the above we submit that the distinction made by the CSC in order to avoid having to promote a large number of New York classification appellants was entirely unjustified. Furthermore, we submit that apart from the inequality of treatment, and the statutory requirement of equal pay for substantially equal work, the substantial time rule was the *proper* rule to have applied. Mr. Friedman in his testimony admitted that there are many writers in the Civil Service field who believe that positions should be classified on the basis of the *highest* function performed by the incumbent regardless of the

amount of time spent in that function (A.925). We respectfully submit that the reason for this approach is apparent. Implicit in the federal classification system is the hope to obtain from federal employees their maximum work capabilities. The incentive which the system provides to its employees is, of course, the possibility of promotion to a higher grade level. However, if an incumbent is required to perform at the higher level for 51% of his time under a rigid mathematical formula, any employing agency seeking to minimize its budget can arrange to have work distributed so that each qualified employee performed at the higher level for *up to* but *not over* 50% of his time. In this way, management is able to have *all* of its higher level work performed, without creating *any* higher level positions. We respectfully submit that this approach constitutes the worst form of exploitation, and lends itself directly to the kind of unjust enrichment on the part of an employing agency described in Argument I, *supra*. In short, it permits an agency to avoid placing any of its non-supervisory employees in grades commensurate with the highest level cases worked on, and at the same time to don a mantle of good faith ignorance regarding the actual work performed by the incumbents. If audits are undertaken by the Civil Service Commission upon employee classification appeals, the agency is then able to juggle work assignments, and quibble about percentage figures and the level of individual cases in order to minimize the impact on its budget of the upgradings which are bound to follow.

While Title 5 does not refer specifically to any particular percentage of higher grade work necessary for a position to be placed in its "proper class and grade," it is reasonable to assume that the employee need only perform at the higher level for a *substantial* portion of his time. Clearly if an employee performs adequately at the higher grade level for a substantial amount of time he is meeting the *qualification requirements* necessary for the level of difficulty and responsibility of the higher grade level as provided in 5 U.S.C. Sec. 5106. To permit the employing agency to continue to reap the benefits of the employee's qualifications and ability to do the higher level work whenever assigned, as long as the percentage of that work does not exceed 51%, is to defeat the aims and purposes of the statute.

In addition to the above, one final point is worthy of mention. There is no dispute that in 1967 following its in-house audits, INS promoted many investigators to GS-12 who were performing at that level for a substantial portion but *not* a majority of their time. This method of promotion was used by INS with the consent of the CSC in lieu of the normal competitive promotion procedures.[6] (A.971). We submit that there is no question that the agency's promotion of its own employees based upon a less than majority of grade 12 work performed, to the exclusion of normal competitive promotion procedures, constitutes an application of the *substantial time rule.* In fact, that is exactly the way Mr. Friedman characterized the INS 1967 promotions when questioned about them (A.928-930). The record, therefore, presents the astounding situation wherein, shortly after the CSC denied numerous promotions in New York based on the application of the *majority time rule,* the INS commenced in-house audits, and promoted a chosen few based upon the *substantial time rule.* Accordingly, we submit that the Commission's oft repeated assertion that the substantial time rule could not be used in New York should be discounted, in light of the Commissions direct authorization to INS to make New York promotions under a procedure which constituted an application of the substantial time rule.

On the basis of all of the above we respectfully submit that the use of the majority time rule by the Civil Service Commission in adjudicating investigator classification appeals in New York was flagrantly illegal, that the court should so declare, and that the adverse decisions made on the basis of the erroneous standard should be set aside.

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6. The actual percentage of GS-12 level work of many of those who were promoted can easily be ascertained by comparing the names which appear with percentage figures in a document entitled "Northwest Region—Percentage of GS-12 Investigations Case Work Performed by GS-11 Investigators—1968—March 1967 Computed from Cases Presented by the Districts" (A.170) with the names of those subsequently upgraded in each district (A.482-487).

IV

ALL APPELLANTS ARE ENTITLED TO RETROACTIVE PROMOTIONS AND BACK PAY

As discussed in previous sections, the INS and CSC acted arbitrarily and illegally. The classification policies and grade evaluation procedures of the appellees clearly had the effect of denying the statutory rights of the named appellants and the class which they represent. The result of such illegal conduct on the part of the appellees was to permit the Government to unjustly enrich itself at the expense of the Investigators, who were required for many years to perform at the GS-12 level, but were compensated at the pay level of GS-11. We submit that the Trial Court erred in declining to order retroactive promotions, and declining to compute the amount of back pay due appellants.

In its decision, the District Court noted that the doctrine of sovreign immunity, as expressed in such cases as *Brown v. General Services Administration*, 507 F.2d 1300, 1307 (2nd Cir. 1974), cert. granted 43 USLW 3625 (1975) (involving racial discrimination) prevents the Court from granting appellants the relief they request. We submit, however, that recent decisions in the Federal Civil Service area have established the right of improperly classified Government employees to receive retroactive benefits and back pay in vindication of their statutory rights.

In the case of *Jankovic v. United States* 384 Fed. Supp. 1355 (DC. DC. 1974) a federal employee brought an action for a determination that he had been an employee of the United States during a period in which the government had classified him as a "self-employed independent contractor", and requested that his retirement benefits be increased to reflect the additional period of prior employment.

In granting the relief requested by plaintiff, the court expressly rejected the Government's argument that the doctrine of sovreign immunity prevented the remedy prayed for, and noted its jurisdiction and authority under the Administrative Procedure Act 5 U.S.C. Sec. 702, and 28 U.S.C. Sec. 1651, and 28 U.S.C. Sec. 2201 (384 F. Supp. at 1357-1358). Having

"cleared the jurisdictional hurdles", the court concluded that the Civil Service Commission had failed to give significance to the evidence of record which, in the opinion of the court, justified the conclusion that plaintiff Jankovic was an "employee" of the Federal Government under the plain meaning of 5 U.S.C. Sec. 8332 (b) and *not* an independent contractor, although denominated as such during a large period of his employment (384 F. Supp. 1361). Consequently, the plaintiff was granted full retroactivity in retirement benefits as requested in the complaint.

Clearly, if the court has the authority to order that a plaintiff be considered a federal employee retroactively, it follows, *a fortiori*, that the court has similar authority to order that individuals who are *already* federal employees be promoted retroactively, and to award them full retroactivity and back pay.

In the case of *Testan v. United States* 499 Fed. 2d 690 (Ct. Cl. 1974), cert. granted 43 U.S.L.W. 3451, (1975) the Court of Claims determined that the manner in which the Civil Service Commission adjudicated the classification appeals of certain employees was arbitrary and capricious. In discussing the claim that the involved appellants made for back pay, the Court stated (499 F.2d at 691):

> "There is no iron jule that we cannot ever award the pay of a higher position to the incumbent of a lower one. We do that in *Selman v. United States,* 498 F.2d 1354 . . . The question always is as to legal entitlement to the higher position. If the entitlement depends on the exercise of discretion by someone else, we cannot substitute our own discretion. *Allison v. United States,* 451 F.2d 1035, (1971); *Pettit v. United States,* 448 F.2d 1026, 203 Ct. Cl. 207 (1973). Here, as in *Pettit,* a remand under Publ. L. 92-415 affords the opportunity to employ the authority having the statutory discretion to exercise it under proper directions . . . The theory of *Allison and Pettit,* however, was that the findings of the agency endowed with the discretion, if newly and correctly made, could create a legal right which we could then enforce by a money judgment".

Under this theory, at the very least, those appellants for which the INS and CSC ultimately made proper findings, and who were

upgraded thereupon, should be awarded back pay for the period during which they were required to perform at the GS-12 level, but were paid at the GS-11 level. In this regard, we note that virtually all of the Investigators who testified indicated that they were performing at the *same* level for all relevant periods (See A.604, 639, 723, 778). In such instances, the "agency endowed with discretion" has already made the finding that the appellants were, in fact performing at a higher level, and the above rationale would permit the award of back pay to those plaintiffs, and to those similarly situated. We also note that *Testan* Case is currently pending before the Supreme Court, and that one of the issues reported in 43 U.S.L.W. 3430, is the question of entitlement to retroactive pay.

While we rely on the *Testan* case in support of our position, we wish to point out that other recent decisions have gone even further in awarding retroactive pay. A leading case in this regard is *McCourt v. Hampton*, 514 F.2d 1365 (4th Cir. 1975). McCourt was a civlian employee of the United States Army who brought an action to be restored to his old position from which he had been demoted, and to be classified in a higher position, for which he maintained he was eligible. McCourt also sought back pay and other damages, stemming from the refusal of his superiors to promote him to the higher position. What had happened, in effect, was that an attempt on the part of McCourt's superiors to promote him had, through a complicated series of events, actually resulted in his demotion. Accordingly, the case combined elements of an adverse action, against which McCourt was entitled to protection under the Veterans Preference Act, 5 U.S.C. Sec. 7512 (a), and an action for judicial review of the employing agency's determination not to promote an incumbent. In finding *for* McCourt, the United States Court of Appeals for the Fourth Circuit, stated (514 F.2d at 1370):

> "This Court has been and will be as assiduous in requiring the government to live up to regulations for the conduct of its own affairs when noncompliance results in prejudice to an adverse party, *see* e.g. *United States v. Heffner*, 420 F.2d 809 (4 Cir. 1969), as it has and will continue to be in requiring a private citizen to regulate and conduct himself and his affairs in accordance with federal law. Here, we deem it certain that McCourt should have been *promoted* noncompetitively to a classification no lower than GS-15. The prejudice to him of *denial of the promotion* and subsequent demotion is

> manifest. It follows that, as prayed for in his complaint, he is entitled to be treated as having occupied the position of Research and Development Administrator, GS-301-15, . . . retroactive as of August 19, 1970. . . . He is, of course, entitled to lost wages to be computed by the District Court. His recovery should be measured by what he should have received, less what he actually received. (Emphasis added.)

We submit that this case clearly stands for the proposition that in proper circumstances, a court is perfectly willing to grant retroactive *promotion* and back pay.

Another very recent and very significant breakthrough in the granting of back pay upon correction of agency classification abuse, has been made by the United States Federal Labor Relations Council, and the Comptroller-General. The Federal Labor Relations Council consists of the chairman of the Civil Service Commission, the Secretary of Labor, and the Director of the Office of Management and Budget, and *interalia*, is responsible for adjudicating exceptions to arbitration awards. See, 5 U.S.C. 7301 and Exec. Order No. 11491 promulgated thereunder.

In *Community Services Administration* and *American Federation of Government Employees, Local No. 2649*, F.L.R.C. No. 74A-29, reported in Federal Labor Relations Council Reports of Case Decisions, No. 91, Dec. 18, 1975, the Council was called upon to review the legality of two retroactive promotions with *back pay* awarded by an arbitrator who had determined that the employing agency failed follow applicable regulations, and had wrongfully *failed to promote* the two involved grievants. The arbitrator found that the agency's failure to comply with its own regulations, which had been *incorporated by reference in the applicable collective bargaining agreement.* constituted a violation of that agreement.

In holding that the arbitrator's award of back pay, in what was essentially a *classification appeal* was valid, the council relied on several decisions of the Comptroller-General holding that "a violation of a mandatory provision in a negotiated agreement which causes an employee to lose pay, allowances or differentials is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay." 54 Comp. Gen. 312 (1974), 54 Comp. Gen. 435 (1974), 54 Comp. Gen. 538 (1974). Under these

decisions, the Back Pay act of 1966, 5 U.S.C. Sec. 5596 (1970), which provides for retroactive pay where an employee is found by "appropriate authority under applicable law or regulation to have undergone an unjustifiable or unwarranted personnel action" is the *appropriate statutory authority* for compensating the employee for pay, he would have received, but for the violation of the negotiated agreement.

In connection with the particular case before it, the Council requested an advisory opinion from the Comptroller General, which it received and quoted in its decision. In this advisory opinion, the Comptroller-General affirmed the above rationale, which effectively establishes the policy of the United States. (B—180010, November 4, 1975, 55 Comp. Gen.) and found that the agency's failure to follow its own regulations constituted a violation of the negotiated agreement.

We respectfully submit that the Government's failure to follow statutory mandate in classification matters is no less an "unwarranted personnel action" under the Back Pay act, where the affected employees are *not* covered by a collective bargaining agreement in which the agency has agreed to abide by all federal laws, and regulations. Clearly the laws and regulations of the United States, and the provisions of the Back Pay Act must be interpreted consistently, whether or not the affected employees are covered by a collective bargaining agreement. We submit that the only difference should be one of forum for adjudication, and that to hold that the substantive law must be interpreted differently depending upon whether or not it has been incorporated by reference to a collective bargaining agreement would be both grossly unfair, and a clear violation of the Constitutional guarantee of equal protection of the laws. Clearly if an agency's failure to classify under applicable statutes and regulations incorporated by reference in a collective bargaining agreement constitutes adverse personnel action within the scope of the Back Pay Act, an agency's failure to follow the same statutes or regulations in the absence of a collective bargaining agreement also falls within the scope of the Act, and its retroactive remedies should be fully applicable.

On the basis of all of the above, we submit that if the INS and CSC have violated the law—as we contend both agencies definitely did—the doctrine of sovreign immunity can no longer be asserted as a bar to preclude the court from granting a full

and complete remedy which includes the right to award retroactive pay. To hold otherwise would be to permit federal agencies to violate the law with impunity, and to disregard statutory directive in the interests of budget and economy, with the firm knowledge that they will *never* be required to compensate the employees who have been wronged. We respectfully submit that, in late twentieth century Post-Watergate America, no individual or government agency can stand above the law, and no agency of government should be permitted to unjustly and unlawfully enrich itself at the expense of its employees.

CONCLUSION

On the basis of all of the foregoing, we respectfully submit that the Immigration and Naturalization Service violated the provisions of the Classification Act by not properly classifying its investigators; that the United States Civil Service Commission did not properly and lawfully carry out its statutory responsibility to fairly adjudicate the Investigators' classification appeals; that the Commission and the Service unlawfully applied a double-standard of classification to the detriment of the appellant Investigators, unlawfully permitted the removal of assigned case work during the pendency of classification appeals, and in general acted in an arbitrary, capricious, and result-oriented manner. We submit that the decision of the District Court should be reversed, and the case remanded back to the District Court for a proper computation and award of back pay consistent with a determination by the Court of Appeals that the appellees have acted unlawfully as outlined above.

Respectfully submitted

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FRIED, FRAGOMEN & DEL REY Kavananjian v. U.S. Immigration

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 26 day of Jan., 19 76 at No. 1 St. Andrews Plaza, NYC deponent served the within Brief upon the Patrick Barth, Asst. U.S. Atty. Appellee herein, by delivering ~~a true~~ 3 true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this day of Jan. 19 76

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976